Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

GERALD MCCOLE,

Petitioner,

v.

RAILROAD RETIREMENT BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Must the Court of Appeals enlarge the record or grant a remand, where it is apparent that the Railroad Retirement Board failed to pursue and consider all relevant issues?

II. Did the Sixth Circuit err in denying enlargement of the record and remand and in determining that the Railroad Retirement Board decision was supported by substantial evidence?

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The order of the United States Court of Appeals for the Sixth Circuit *in Gerald McCole v. Railroad Retirement Board*, No. 00-3751 denying the petition for rehearing unreported and set forth in the Appendix hereto (App. 1a).

The opinion of the United States Court of Appeals for the Sixth Circuit in *Gerald McCole v. Railroad Retirement Board*, No. 00-3751 is unreported and set forth in the Appendix hereto (App. 2a-7a).

The order of the United States Court of Appeals for the Sixth Circuit in *Gerald McCole v. Railroad Retirement Board*, No. 00-3751 denying the motion to enlarge the record is unreported and set forth in the Appendix hereto (App. 8a-9a).

The decision of the Railroad Retirement Board in *Appeal of Gerald McCole*, R.R.B. No. A-368-38-8393, Claims Appeal Docket No. 98-AP-0097 is unreported and set forth in the Appendix hereto (App. 10a-11a).

The decision of the Hearings Officer on the claim of *Gerald A. McCole*, Decision No. 98-680, Appeal No. 97-0625, RRB No. A-368-38-8393 is unreported and set forth in the Appendix hereto (App. 12a-16a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit affirming the decision of the Railroad Retirement Board was entered on August 17, 2001. (App. 2a-7a). The order denying the timely-filed petition for rehearing was entered on October 12, 2001. (App. 1a). This petition for writ of certiorari is filed within ninety (90) days from that date. SUP. CT. R. 13.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

> No person shall...be deprived of life, liberty, or property, without due process of law...

42 U.S.C. Section 418

> The Commissioner of Social Security shall, at the request of any State, enter into an agreement with such State for the purposes of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof...

42 U.S.C. Section 423(c)(1)

> An individual shall be insured for disability insurance benefits in any month if—(A) he would have been a fully insured individual (as defined in section 214) had he attained age 62 and filed application for benefits under section 202(a) on the first day of such month, and (B)(i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred...

42 U.S.C. Section 426(b)

> Every individual who—(1) has not attained age 65, and (2)...(B) is, and has been for not less than 24 months, a disabled qualified railroad retirement beneficiary within the meaning of section 7(d) of the Railroad Retirement Act of 1974...shall be entitled to hospital insurance benefits under part A of

title XVIII for each month beginning...the twenty-fifth month of his entitlement of status as a qualified railroad retirement beneficiary...

45 U.S.C. Section 231(o)

An individual shall be deemed to have a "current connection with the railroad industry" at the time an annuity begins to accrue to him and at death if, in any thirty consecutive calendar months before the month in which an annuity under this Act begins to accrue to him, or the month in which he dies if that first occurs, he will have been in service as an employee in not less than twelve calendar months and, if such thirty calendar months do not immediately precede such month, he will not have been engaged in any regular employment other than employment for [a railroad]...in the period before such month and after the end of such thirty months...

45 U.S.C. Section 231a(a)(1)(iv)

The following-described individuals, if they shall have completed ten years of service and shall have filed application for annuities, shall...be entitled to annuities...individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty...

45 U.S.C. Section 231f(b)(7)

> ...the Secretary of Health and Human Services shall furnish the Board certified reports of wages...Such certified reports shall be conclusive in adjudication as to the matters covered therein: Provided, however, That if the Board or the Secretary of Health and Human Services receives evidence inconsistent with a certified report and the application involved is still in course of adjudication or otherwise open for such evidence such recertification of such report shall be made as, in the judgment of the Board or the Secretary of Health and Human Services, whichever made the original certification, the evidence warrants.

45 U.S.C. Section 231f(d)

> ...every person who...has not attained age 65 and (A) has been entitled to an annuity under section 2 of this Act...for not less than 24 months and (B) could have been entitled for 24 calendar months, and could currently be entitled, to monthly insurance benefits under section 223 of the Social Security Act...on the basis of disability if service as an employee...had been included in the term "employment" as defined in that Act and if an application for disability benefits had been filed, shall be certified to the Secretary of Health, Education, and Welfare as a qualified railroad retirement beneficiary under section 226 of the Social Security Act.

45 U.S.C. Section 355(f)

> Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein. It shall have power to enter a decree affirming, modifying, or reversing the d cision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified finings and conclusions with the court, and the Board shall file with the court the additional record.

20 C.F.R. Section 216.13(b)

> An employee has a current connection with the railroad industry if he or she meets one of the following requirements...(b) The employee has creditable railroad service in at least 12 months in a period of 30 consecutive months and does not work in any regular non-railroad employment in the interval between the month the 30-month period ends and the earlier of (1) The month his or her annuity begins...

20 C.F.R. Section 216.16(b)

> Regular non-railroad employment does not include any of the following:...(2) Temporary work provided as relief by an agency of a Federal, State, or local government...

20 C.F.R. Section 404.1018b

> The work of a Federal, State or local government employee not otherwise subject to Social Security coverage may constitute Medicare qualified government employment. Medicare qualified government employment means any service which in all ways meets the definition of "employment" for title II purposes of the Social Security Act, except for the fact that the service was performed by a Federal, State or local government employee. This employment is used solely in determining eligibility for protection under part A of title XVIII of the Social Security Act (Hospital Insurance)...

20 C.F.R. Section 404.1025

> Work done after 1983 by an employee in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) of the Code which is exempt from income tax under section 501(a) of the Code is covered as employment...

20 C.F.R. Section 404.1028

> (b) For purposes of this section, a school, college, or university has its usual accepted meaning. It does not, however, include any school, college, or university that is an instrumentality or integral part of a State or a political subdivision of a State for which work can only be covered by an agreement under section 218 of the Act....(b) If you are a student, any work you do as an employee of a school, college, or university is excluded from employment, if you are enrolled in and regularly attending classes at that school, college, or university...

STATEMENT OF THE CASE

From February, 1959 through May, 1986, Gerald McCole ("McCole") accrued over 26 years of creditable service while employed with railroads. Following his railroad employment, McCole was a part-time employee with Bay de Noc Community College ("Bay de Noc") in Escanaba, Michigan while he was a full-time student, both under the federal work-study program from August, 1989 to August, 1991, and outside the program from September 1991 to March, 1993. (App. 4a, 13a). In addition, McCole had other part-time non-railroad employment in July and August, 1993.

McCole became disabled as of September 1, 1993 (App. 12a), and applied for an occupational disability annuity under the Railroad Retirement Act ("RRA") and for disability Medicare coverage under the Social Security Act ("SSA") on October 30, 1995.

In order to qualify for an occupational disability annuity pursuant to 45 U.S.C. Section 231a(a)(1)(iv), McCole must have a "current connection" with the railroad industry. 45 U.S.C. Section 231(o). "Regular non-railroad employment" breaks the current connection. 20 C.F.R. Section 216.13b. Excluded from "regular non-railroad employment" is "Temporary work provided as relief by an agency of a Federal, State, or local government." 20 C.F.R. Section 216.16(b). McCole's work for Bay de Noc, both under the work-study program and after, falls within this exception and thus does not break the current connection. Work-study is government financial aid provided on a need basis. 42 U.S.C. Section 2751, et seq. In addition, the non-work-study employment also qualifies as "temporary relief" since McCole was employed to pay for living expenses while attending college, was only receiving minimal income and was living under the poverty level. McCole meets the disability requirement (App. 14a) and meets all other requirements for an occupational disability annuity. McCole's other part-time, non-railroad employment in July and August of 1993 does not

break the current connection due to the minimal amount involved, which is not disputed.

In order to qualify for disability Medicare coverage pursuant to 42 U.S.C. Section 426(b), McCole must have 20 quarters of coverage during the 40-quarter period from the 4th quarter of 1983 through the 3rd quarter of 1993. (App. 15a). 42 U.S.C. Section 423(c)(1). McCole earned at least 14 quarters of coverage during this time period from his railroad employment. (App. 15a) In order to have sufficient quarters of coverage, his employment with Bay de Noc must be included.

Although work done by students at their own school is generally excluded from employment and mandatory coverage for Social Security purposes, several exceptions apply which require inclusion of McCole's earnings from Bay de Noc in his covered earnings. (1) There is an exception for "any school, college, or university that is an instrumentality or integral part of a State or a political subdivision of a State for which work can only be covered by an agreement under U.S.C. 42 section 218 of the Act." 20 C.F.R. Section 404.1028. McCole has learned that Bay de Noc apparently has a Section 218 agreement (42 U.S.C. Section 418) for Social Security coverage, and thus McCole's work for Bay de Noc should have been included in his quarters of coverage. The work-study also may be considered work not for the school, but for the government and thus the exclusion from employment would not apply. (2) 20 C.F.R. Section 404.1025 provides that work performed by an employee in the employ of an educational organization exempt pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Section 501(c)(3)) is covered as employment. (3) If McCole's employment with Bay de Noc is considered to be employment with the Federal, State or local government by virtue of the work-study program or the relationship of Bay de Noc to the government, and is thus not otherwise subject to Social Security coverage, the employment still counts for Medicare purposes. 20 C.F.R. Section 404.1018b.

Under each of these exceptions, McCole's employment with Bay de Noc should be included in his quarters of coverage, thus giving him sufficient quarters of coverage for disability Medicare. McCole meets the disability requirement (App. 14a) and all other requirements for disability Medicare coverage.

The Railroad Retirement Board ("RRB") has subject matter jurisdiction over McCole's claims pursuant to 45 U.S.C. Section 231f.

McCole's application was denied by the RRB, and McCole perfected his appeal within the RRB procedures. McCole had a hearing on March 13, 1998, at which he appeared without representation by counsel. (App. 5a). The RRB had before it McCole's Social Security earnings record and W-2's from the years 1989-1993. The earnings record reflected no earnings during 1989-1992 (App. 5a-6a), and the W-2's reflected McCole's earnings from Bay de Noc in 1989 through 1993 (App. 3a). Before any evidence was taken, the Hearings Officer summarily concluded that, based on the Social Security earnings record, McCole did not have sufficient quarters of coverage. (App. 14a, R. 294-295). McCole was clearly surprised by the Medicare issue. (R. 296-298).

The Hearings Officer found in the decision dated March 31, 1998 (1) that McCole does not have a current connection with the railroad industry and is thus not eligible for consideration for an occupational disability annuity under the RRA (45 U.S.C. Section 231a(1)(iv)), (2) is disabled for all regular employment and is entitled to a disability annuity under the RRA (45 U.S.C. Section 231(a)(1)(v)) beginning October 1, 1994, and (3) although McCole meets the disability criteria for a period of disability under the SSA he does not have sufficient quarters of coverage. (App. 12a-16a).

In its decision dated August 18, 1998, the 3-member panel of the RRB denied McCole's appeal and affirmed the decision of the Hearings Officer. (App. 10a-11a).

The Sixth Circuit had subject matter jurisdiction over the appeal pursuant to 45 U.S.C. Section 231g and 45 U.S.C. Section 355(f). McCole timely filed a petition for review in the Sixth Circuit. (App. 2a-3a).

McCole filed a motion to enlarge the record in the Sixth Circuit, in which he sought to have the record enlarged to include information about the relationship of Bay de Noc to the State or a political subdivision or the Federal or local government, the Section 218 (42 U.S.C. Section 418) agreement with the Administration, Bay de Noc's status as a tax-exempt organization, the effect that the federal work-study program had on Bay de Noc's relationship with the government, and whether McCole authorized Bay de Noc's failure to withhold FICA. The motion to enlarge was denied on August 23, 2000. (App. 8a-9a).

The opinion of the Sixth Circuit was filed on August 17, 2001, and affirmed the decision of the RRB. The Sixth Circuit found that there was substantial evidence for the RRB determinations that McCole's current connection was broken and that he had insufficient quarters of coverage. (App. 2a-7a).

McCole timely filed a petition for rehearing in the Sixth Circuit, which was denied on October 12, 2001. (App. 1a).

McCole has timely filed this petition for writ of certiorari within ninety days of the order denying the petition for rehearing. SUP. CT. R. 13.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit decided an important question of federal law that has not been but should be settled by this Court: Must the Court of Appeals enlarge the record or grant a remand, where it is apparent that the Railroad Retirement Board failed to pursue and consider all relevant issues? The Court of Appeals must enlarge the record or grant a remand, where it is apparent that the Railroad Retirement Board failed to pursue and consider all relevant issues.

A. ENLARGEMENT/REMAND

45 U.S.C. Section 355(f) states that:

> The findings of the [RRB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court but the court may order additional evidence to be taken before the [RRB], and the [RRB] may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the [RRB] shall file with the court the additional record.

This indicates a procedure where there is a remand for further factfinding before the RRB, and then enlargement of the record. In addition, 45 U.S.C. Section 355(f) provides that "[The court of appeals] shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing."

There is additional authority for a remand in *Jacques v. United States Railroad Retirement Board*, 736 F.2d 34 (2d Cir. 1984), especially where a motion to enlarge the record was filed as it was by both McCole and Jacques.

B. COULTER V. WEINBERGER

In *Coulter v. Weinberger*, 527 F.2d 224 (3d Cir. 1975), the Third Circuit stated that:

> We conclude that [the claimant] has not been given a full and complete hearing on the issues of past disability and eligibility for coverage under the [Social Security] Act. Accordingly, we vacate a denial of benefits and remand because of a record which reveals a failure to review relevant rulings and regulations.

Like McCole, the claimant was not represented by counsel.

The issues were whether the claimant was ever given the full hearing to which he was entitled under the SSA and whether there was a correct computation of the 20/40 quarters of coverage requirement of Section 223(c) of the SSA (42 U.S.C. Section 423(c)). The Third Circuit noted that "the process is not based on adversarial concepts." The Third Circuit determined that the record revealed error that would require reopening of the claim, since the hearing officers failed to consider all of the applicable regulations and overlooked other relevant factors.

The Third Circuit found that "the facile solution of relying almost entirely upon earnings during part of 1962 does not give the claimant the full and complete hearing to which he is entitled", and noted that:

> A social security judge acts as an examiner charged with developing the facts, Richardson v. Perales, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), and is under an affirmative duty to inquire into all the matters at issue. 20 C.F.R. s 404.927. As we said in Hess v. Secretary of Health, Education and Welfare, 497 F.2d 837, 840 (3d Cir. 1974):

> "Although the burden is upon the claimant to prove his disability, due regard for the beneficent purposes of the legislation require that a more tolerant standard be used in this administrative proceeding than is applicable in a typical suit in a court of record where the adversary system prevails."

C. KEPHART V. RICHARDSON

In *Kephart v. Richardson*, 505 F.2d 1085 (3d Cir. 1974), the Third Circuit noted that:

> While silence may be golden in the adage, silence in the Social Security records of employment may have quite a contrary effect on a claimant for disability benefits who must establish a wage earning history. In this appeal from a denial of benefits, we conclude that, while the absence of earnings entries is statutorily denominated evidence of nonemployment, it may be outweighed by credible testimony of the claimant which fills the void. Because the administrative process failed to properly consider the positive evidence which might have eliminated the negative, we remand for further proceedings.

The claimant's benefits were denied due to a finding that he did not have enough quarters of coverage, and the denial was primarily because the Social Security records did not show any payment of wages for a certain period of time. The claimant produced evidence that he had been employed during this period, in the form of a detailed affidavit signed by himself and others that he worked as a farmhand, as well as his testimony to the same. There was also evidence from employers confirming the employment. The Administration determined that the evidence of employment was insufficient to rebut the presumption of validity of the Social Security records.

The Third Circuit stated that:

> The issue in this case is a very narrow one and is focused on the determinations to be made when a claimant alleges that he did in fact work during a given period of time for which the government's records are silent. We conclude that a claimant is entitled to substantiate his position and that this evidence must be given consideration by the Social Security Administration.

The Third Circuit noted that the Social Security earnings records are not "entitled to the deference usually extended to matters covered by the presumption of administrative regularity."

Noting that upon undertaking an investigation of the claimant's earnings, in fairness the government should have obtained further explanation, the Third Circuit quoted its decision in *Hess v. Secretary of Health, Education and Welfare*, 497 F.2d 837, 840 (3d Cir. 1974):

> Although the burden is upon the claimant to prove his disability, due regard for the beneficent purposes of the legislation requires that a more tolerant standard be used in this administrative proceeding than is applicable in a typical suit in a court of record where the adversary system prevails . . . We do not say that an administrative law judge must search out all the relevant evidence which might be available, since that would in effect shift the burden of proof to the government. But, these proceedings are extremely important to the claimants, who are in real need in most instances and who claim not charity but that which is rightfully due as provided for in Chapter 7, Subchapter II, of the Social Security Act.

The Third Circuit found that:

> The hearing examiner applied an improper standard in weighing the evidence dealing with Kephart's employment and that there was not a full development of other evidence on this point, the judgment of the district court will be vacated and the matter remanded to the district court with directions for remand to the Social Security Administration for further proceedings consistent with this opinion.

D. CURRENT CONNECTION

The issue is whether McCole's employment with Bay de Noc is "regular non-railroad employment" which breaks his current connection.

McCole, unrepresented by counsel, raised the "temporary work" exception at the hearing as well as he could and pointed out that some of the Bay de Noc employment was work-study. It was also evident that Bay de Noc Community College is a public institution. However, the Hearings Officer failed to further develop the issues or elicit evidence necessary to make the determinations, despite assuring McCole that she would do so. Enlargement of the record or remand was necessary to provide McCole with a full and fair hearing. *Jones v. RRB*, 614 F.2d 151 (8th Cir. 1980). The RRB's failure to develop and adequately consider the issues regarding the work-study program and the relationship of Bay de Noc to the federal, state or local government and the Sixth Circuit's failure to remedy the situation by enlarging the record or granting remand, resulted in a violation of McCole's Fifth Amendment (U.S. Const. Amend. V) right to due process. The RRB's interpretation of the "temporary work" exception also violated the purpose of the RRA to provide benefits for claimants so entitled.

E. QUARTERS OF COVERAGE

The issue is whether McCole's employment with Bay de Noc should be included in his quarters of coverage.

The Hearings Officer's summary conclusion that McCole had not met the earnings requirement was based solely on the Social Security earnings record, a document prepared by the Administration without input from McCole. The Hearings Officer made this conclusion at the beginning of the hearing and received no further evidence on the matter, despite her assurances that if further evidence was needed, she would request it and would add it to the record. McCole, unrepresented by counsel, was surprised by and clearly did not understand this issue which he noted was "brand new."

The exceptions to the exclusion from covered earnings were apparent to the Hearings Officer from McCole's employment as a student with Bay de Noc, and the fact that this employment was included in his W-2 earnings and not in his Social Security earnings.

No evidence regarding the relationship of Bay de Noc to the federal, state or local government, no evidence of whether there was an agreement for coverage under Section 218, (42 U.S.C. Section 418) only minimal evidence regarding the work-study program and no evidence regarding Bay de Noc's income tax-exempt status was elicited by the Hearings Officer. This evidence was essential to the determination of whether McCole's employment with Bay de Noc fell within any of the exceptions to the exclusion and thus that he had the required quarters of coverage. Enlargement of the record or remand to the RRB was necessary to obtain a full and fair hearing. *Coulter v. Weinberger*, 527 F.2d 224 (3d Cir. 1975) The RRB further failed to consider whether McCole's employment with Bay de Noc was Medicare qualified government employment and thus counted among his quarters of coverage for the purpose of determining his eligibility for Medicare.

Although 45 U.S.C. Section 231f(b)(7) states that a certified report from the Administration "shall be conclusive in adjudication as to the matters covered therein," that provision is qualified:

> Provided, however, That if the [Railroad Retirement] Board or the . . . [Secretary of Health and Human Services] receives evidence inconsistent with a certified report and the application involved is still in the course of adjudication or otherwise open for such evidence such recertification of such report shall be made as, in the judgment of the [Railroad Retirement] Board or the . . . [Secretary of Health and Human Services] whichever made the original certification, the evidence warrants.

The fact that there are no Social Security earnings recorded for the period of employment at Bay de Noc is not dispositive of the issue. *Kephart v. Richardson*, 505 F.2d 1085 (3d Cir. 1974). The issue of McCole's quarters of coverage and qualification for disability Medicare coverage should not have been summarily determined by the Hearings Officer, but should have been given a full and fair hearing.

Instead of relying on the Social Security earnings record, the Hearings Officer should have recognized McCole's need to obtain a redetermination of his covered earnings, since the RRB was well aware from the Social Security earnings record, the W-2's and McCole's testimony that McCole's employment history included work which was not included in the Social Security earnings record. While 45 U.S.C. Section 231f(b)(7) anticipates evidence being received by the RRB as to Social Security covered earnings, that section does not specify how the matter of recertification is brought before the Administration. Since the Sixth Circuit did not allow enlargement of the record, this matter should have been remanded to the RRB with instructions to hold the case open to allow McCole to petition the Administration for

redetermination of his covered earnings, and then for the RRB to determine the issue of McCole's entitlement to disability Medicare coverage.

If the RRB had the authority to recertify McCole's earnings record, it would have been much more likely that the Sixth Circuit would have granted the remand. McCole specifically requested that the Sixth Circuit remand the case to the RRB for the purpose of allowing him to petition the Administration for recertification, asserting the relevant exceptions. Due to this inequity created by the inter-related but separate RRB and Social Security systems, it is important for this Court to instruct the RRB at the agency level as to when its failure to pursue relevant issues will result in reversal in the Court of Appeals, and to instruct the Court of Appeals as to when it should grant a remand.

As noted in *Coulter*, the claimant is denied a full and complete hearing where the hearings officer fails to review relevant regulations. Likewise, reliance on "facile" solutions such as the earnings record denies a full and complete hearing. In the non-adversarial system, the hearings officer is charged with the duty of developing facts and has an affirmative duty to inquire into all matters at issue. The beneficent purpose of the SSA and the RRA requires a standard more tolerant to the claimant. The agency's failure to meet these standards requires remand by the Court of Appeals.

As noted in *Kephart*, the absence of an earnings record is not conclusive, and the claimant is entitled to substantiate his position. The Social Security earnings record is not entitled to deference. Like in *Coulter*, the beneficent purpose of the SSA and the RRA requires a more tolerant standard. When the agency fails to consider relevant evidence, remand is required.

The non-adversarial RRB claims system places a burden on the agency to pursue relevant exceptions. The substantial evidence standard is an onerous burden on the

claimant which creates inequity where the RRB fails to pursue and consider relevant issues. This denial of a full and complete hearing violates McCole's Fifth Amendment (U.S. Const. Amend. V) right to due process. Where, as in McCole's case, it is apparent that the RRB failed to pursue and consider relevant issues, the Court of Appeals must allow enlargement of the record or remand.

The principles set forth in *Coulter* and *Kephart* should be adopted by this Court in the RRB context due to the inter-relation of the two agencies and the RRB's role in administering the SSA. The systems share a beneficent purpose of providing benefits to claimants who are entitled, as well as a non-adversarial process.

II. The Sixth Circuit erred and misapplied the law in denying enlargement of the record and remand, and in finding that substantial evidence existed for the Railroad Retirement Board decision.

A. SUBSTANTIAL EVIDENCE

45 U.S.C. Section 355(f) provides the basis for the "substantial evidence" standard of review: "The findings of the [RRB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive." The Sixth Circuit has held that decisions of the RRB regarding entitlement to benefits are not to be reversed if supported by substantial evidence and not based on a legal error. *Coker v. Gielow*, 806 F.2d 689 (6th Cir. 1986), *cert. den.*, 482 U.S. 906 (1987), *reh. den.*, 483 U.S. 1040 (1987). This Court considered the meaning of "substantial evidence" in *Richardson v. Perales*, 402 U.S. 389 (1971), a Social Security case. In *Richardson*, This Court quoted *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), a "similar context[]", in which it held that "substantial evidence" was "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." This Court noted in *Richardson* that it had "adhered to that definition in varying statutory situations." This definition of "substantial

evidence" was applied in the RRB context by the Seventh Circuit in *Dray v. RRB*, 10 F.3d 1306 (7th Cir. 1993).

1. CURRENT CONNECTION

The Sixth Circuit found in McCole's case that it was proper for the hearings officer to avoid deciding the issue of whether McCole's work-study at Bay de Noc broke the current connection since it found that McCole's earnings records for 1991, 1992 and 1993, showing part-time work for the college, provided substantial evidence that the current connection was broken. McCole argued that the employment in 1991, 1992 and 1993 qualified as "temporary work provided as relief by the Federal, State or local government" (20 C.F.R. Section 216.16(b)) and thus that it did not break the current connection. Unrepresented by counsel, McCole offered no evidence at the hearing regarding Bay de Noc's relationship to the government.

Although *Coulter* and *Kephart* were Social Security cases, the principles of less than strict adherence to rules which disfavor the claimant, not allowing "facile" solutions when to do so would deprive the claimant of a full and complete hearing, recognizing the examiner's affirmative duty to inquire into all matters at issue, and more tolerance toward the claimant apply to this determination under the RRA as well. Both the SSA and the RRA have the "beneficent" purpose, whether stated or not, of providing benefits to claimants who are so entitled. Both systems are non-adversarial. McCole was not given a full and complete hearing as to whether the "temporary work" exception applied to prevent a break in his current connection.

The Sixth Circuit erred in finding that there was substantial evidence supporting the RRB decision that the current connection was broken. The Fifth Circuit has held that the RRB must show a meticulous concern that the petitoner's case be fully presented and fairly tried. *Squires v. RRB*, 161 F.2d 182 (5th Cir. 1947). The denial of a full and complete hearing is grounds for vacating a decision denying

benefits and remanding the claim to the agency. The primary purpose behind the disability provisions of the SSA is to provide workers with protection against hardships created by loss of earnings due to illness or old age. *Sciarotta v. Bowen*, 735 F.Supp. 148 (D.N.J. 1989). The statutes providing for disability benefits are remedial in nature and are to be broadly construed and liberally applied. *Bastien v. Califano*, 572 F.2d 908 (2d Cir. 1978).

The W-2's and McCole's testimony are not, under the circumstances and the law, substantial evidence that McCole broke his current connection with the railroad industry with his employment with Bay de Noc.

2. QUARTERS OF COVERAGE

McCole argued on appeal that the exceptions applied to require inclusion of his earnings from Bay de Noc in his quarters of coverage. (1) There is an exception for "any school, college, or university that is an instrumentality or integral part of a State or a political subdivision of a State for which work can only be covered by an agreement under section 218 of the Act." 20 C.F.R. Section 404.1028. McCole has learned that Bay de Noc apparently has a Section 218 (42 U.S.C. Section 418) agreement for Social Security coverage, and thus McCole's work for Bay de Noc should have been included in his quarters of coverage. The work-study also may be considered work not for the school, but for the government and thus the exclusion from employment would not apply. (2) 20 C.F.R. Section 404.1025 provides that work performed by an employee in the employ of an educational organization exempt pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Section 501 (c)(3)) is covered as employment. (3) If McCole's employment with Bay de Noc is considered to be employment with the Federal, State or local government by virtue of the work-study program or the relationship of Bay de Noc to the government, and is thus not otherwise subject to Social Security coverage, the employment still counts for Medicare purposes. 20 C.F.R. Section 404.1018b.

The Sixth Circuit held that the RRB's determination that McCole's earnings from Bay de Noc was not counted in calculating his quarters of coverage was supported by substantial evidence in the form of the Social Security earnings records. The Sixth Circuit determined that *Kephart* did not apply because the claimant there placed contradictory, positive evidence in the record, the claimant sought a recertification from the Administration and the statute there provided that the absence of an entry in the earnings record was presumptive but not conclusive. However, McCole was prevented by the Hearings Officer's summary conclusion that he did not have enough quarters of coverage from offering any evidence of the exceptions. McCole was surprised by this issue. He requested remand from the Sixth Circuit with instructions for the RRB to hold the case open to allow him to seek recertification from the Administration, asserting the relevant exceptions. The Sixth Circuit denied this relief.

The principles set forth in *Kephart* as well as in *Coulter* apply to McCole's case. The principles of less than strict adherence to rules which disfavor the claimant, not allowing "facile" solutions when to do so would deprive the claimant of a full and complete hearing, recognizing the examiner's affirmative duty to inquire into all matters at issue, and more tolerance toward the claimant, all apply here.

Both the SSA and the RRA have the "beneficent" purpose, whether stated or not, of providing benefits to claimants who are so entitled. Both systems are non-adversarial. McCole was not given a full and complete hearing as to whether the exceptions applied to require inclusion of his earning with Bay de Noc.

McCole argued that his work for Bay de Noc should have been included in his earnings record due to enumerated exceptions and requested that the Sixth Circuit remand his case to the RRB, with instructions to hold the case open to allow him to correct the earnings record with the Administration. In that setting, the statute set forth in

Kephart, 42 U.S.C. Section 405(c)(4)(B), applies. Section 405(c)(4)(B) provides that:

> The absence of an entry in the Commissioner's records as to the wages alleged to have been paid by an employer to an individual during any period in such year shall be presumptive evidence for the purposes of this subchapter that no such alleged wages were paid to such individual in such period . . .

The Sixth Circuit points out that the statute in this case, 45 U.S.C. Section 231f(b)(7), does not make a distinction between presumptive and conclusive evidence of employment. However, 45 U.S.C. Section 231f(b)(7) recognizes that:

> Such certified records shall be conclusive in adjudication as to the matters covered therein: Provided, however, that if the Board or the Secretary of Health and Human Services receives evidence inconsistent with a certified report and the application involved is still in course of adjudication or otherwise open for such evidence such recertification of such report shall be made as, in the judgment of the Board or the Secretary of Health and Human Services, whichever made the original certification, the evidence warrants.

Here, the RRB did not give McCole an opportunity to offer any evidence of why his employment at Bay de Noc should be included in his Social Security earnings or to address any regulation justifying inclusion of his work, and instead summarily concluded before any evidence was taken that he had insufficient quarters of coverage based on the Social Security earnings record.

The Sixth Circuit erred in finding that there was substantial evidence supporting the RRB decision that

McCole had insufficient quarters of coverage. The Fifth Circuit has held that the RRB must show a meticulous concern that the petitoner's case be fully presented and fairly tried. *Squires v. RRB*, 161 F.2d 182 (5th Cir. 1947). The denial of a full and complete hearing is grounds for vacating a decision denying benefits and remanding the claim to the agency. The primary purpose behind the disability provisions of the SSA is to provide workers with protection against hardships created by loss of earnings due to illness or old age. *Sciarotta v. Bowen*, 735 F.Supp. 148 (D.N.J. 1989). The statutes providing for disability benefits are remedial in nature and are to be broadly construed and liberally applied. *Bastien v. Califano*, 572 F.2d 908 (2d Cir. 1978).

The Social Security earnings records are not, under the circumstances and the law, substantial evidence that McCole did not have sufficient quarters of coverage due to the exclusion of his employment for Bay de Noc.

B. ENLARGEMENT/REMAND

The RRB did not make any determination as to whether McCole's employment through the work-study program broke the current connection.

Further, all of McCole's employment for Bay de Noc is "Temporary work provided as relief by an agency of the Federal, State, or local government" due to the fact that McCole was so employed to pay for living expenses while attending college, was only receiving minimal income and was living under poverty level. 20 C.F.R. Section 216.16. Bay de Noc is likely funded by the federal, state and/or local government, if not an instrumentality of the state or local government. Further information regarding the nature of work-study, other than McCole's layman's knowledge of the subject, and any information regarding the relationship of Bay de Noc to the federal, state or local government was not contained in the record. The RRB did not adequately consider the issue of whether McCole's employment with Bay de Noc falls under the "temporary work" exception because

of Bay de Noc's relationship to the government, since this issue was not considered at all by the RRB. The failure of the RRB to develop and adequately consider these issues resulted in the need to reverse and remand the case to the RRB for further proceedings.

It is inequitable to allow the RRB to deny McCole's claim with only a nod to the "temporary work" exception, without considering at all the crucial issue therein of Bay de Noc's relationship to the government and with only cursory consideration of the nature of the work-study program.

In addition, the Hearings Officer failed to pursue and consider the exceptions to the exclusion from Social Security covered earnings for the purpose of determining quarters of coverage, which should have been apparent due to the information before her. McCole was unrepresented by counsel and was clearly surprised by the disability Medicare coverage issue. Instead of relying on the Social Security earnings record, the Hearings Officer should have recognized McCole's need to obtain a redetermination of his covered earnings, since the RRB was well aware that McCole's employment history included work which was not included in the Social Security earnings record. This matter should have been remanded to the RRB with instructions to hold the case open to allow McCole to petition the Administration for redetermination of his covered earnings, and then for the RRB to determine the issue of McCole's entitlement to disability Medicare coverage. Remand to the RRB was necessary to provide McCole with a full and fair hearing, and the Sixth Circuit erred in denying remand. *Coulter v. Weinberger*, 527 F.2d 224 (3d Cir. 1975).

The Sixth Circuit erred in denying enlargement of the record and remand, since remand was necessary to provide a full and complete hearing and to prevent violation of the Fifth Amendment (U.S. Const. Amend. V) right to due process.

CONCLUSION

At his RRB hearing, McCole raised the "temporary work" exception to "regular non-railroad employment" which breaks the "current connection" as well as he was able without counsel. The Hearings Officer should have recognized the need for more information regarding the work-study program and Bay de Noc's relationship with the government. The Hearings Officer, however, failed to follow up on this identified exception which would have applied to preserve McCole's current connection and his eligibility for an occupational disability annuity under the RRA.

At the hearing, McCole was surprised by the disability Medicare/quarters of coverage issue. This issue was summarily disposed of against his favor, even though the Hearings Officer was aware of circumstances which raised issues of whether exceptions to the exclusion from covered earnings applied. The exceptions required inclusion of McCole's earnings from Bay de Noc and thus would have given him sufficient quarters of coverage to qualify for disability Medicare coverage.

McCole sought enlargement of the record and remand from the Sixth Circuit to have information regarding the exceptions considered by the RRB and the Administration. McCole specifically sought remand with instructions to the RRB to hold the case open to allow him to seek recertification of his earnings record from the Administration. The Sixth Circuit's denial of enlargement of the record and remand and finding of substantial evidence supporting the RRB decision were all reversible error. Further, the resulting inequity to McCole and other claimants like him where the RRB fails to pursue and consider relevant issues such as exceptions to regular non-railroad employment and exclusion from covered earnings, coupled with the onerous substantial evidence standard on review, calls for this Court's direction to the RRB and the Court of Appeals that remand is required in these situations where the claimant is denied a full and complete hearing.

For the reasons identifed herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit and ultimately to vacate and reverse the decision below and remand the matter to the RRB for further hearing, with instructions to hold the case open to allow recertification of McCole's earnings record by the Administration.

Respectfully submitted,

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(Any footnotes trail end of each document)
Case No: 00-3751

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
OCTOBER 12 2001
LEONARD GREEN, Clerk

GERALD MCCOLE
Petitioner

v.

RAILROAD RETIREMENT BOARD
Respondent

BEFORE: CLAY, GILMAN, AND WALLACE*, Circuit Judges.

Upon consideration of the petition for rehearing filed by the petitioner,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green, Clerk
Leonard Green, Clerk

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*The Hon. J. Clifford Wallace, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

NOT RECOMMEND FOR FULL-TEXT PUBLICATION

Case No. 00-3751

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
AUG 17 2001
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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This notice is to be prominently displayed if this decision is reproduced.

GERALD MCCOLE,
Petitioner,

v.

RAILROAD RETIREMENT BOARD,
Respondent.

PETITION FOR REVIEW OF RAILROAD RETIREMENT BOARD DECISION DENYING ANNUITY AND DISABILITY MEDICARE

BEFORE: CLAY, GILMAN, and WALLACE*, Circuit Judges.

J. Clifford Wallace, Senior Circuit Judge. McCole petitions for review of a decision by the Railroad Retirement Board (Board) which denied his claim for an occupational disability annuity and for disability Medicare coverage. The Board had jurisdiction pursuant to 45 U.S.C. Section 231f. We have jurisdiction of this timely filed appeal pursuant to 45

U.S.C. Section 231g (incorporating by reference 45 U.S.C. Section 355(f)). We deny the petition.

We will not set aside a decision of the Board regarding entitlement to benefits under the Railroad Retirement Act (Act) "if it is supported by substantial evidence in the record and is not based on an error of law." Coker v. Gielow, 806 F.2d 689, 693 (6th Cir. 1986). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Chandler v. United States R.R. Ret. Bd., 713 F.2d 188, 189 (6th Cir. 1983).

McCole first argues that the Board's determination that he lacks a current connection with the railroad industry is not supported by substantial evidence and is tainted by legal error. Under the Act and applicable regulation, McCole has a current connection with the railroad industry only if he did not engage in regular non-railroad employment between the end of the last thirty-month period in which he had twelve months of creditable railroad service and his claimed annuity beginning date. Kleinberg v. R.R. Ret. Bd., 18 F.3d 1432, 1435 (8th Cir. 1994)(discussing 45 U.S.C. Sections 231a(a)(1) & 231(o)). The parties agree that McCole's thirty-month period ended November 1987 and that his claimed annuity beginning date is October 1, 1994 [Blue 8-9, Red 18-19]. Because McCole's thirty-month period ended more than a year before his claimed annuity beginning date, the current connection is broken if (1) McCole had regular non-railroad employment "in any 2 consecutive years wholly or partially'" between November 1987 and October 1, 1994; and (2) he earned at least $1000 in such employment any year during that interval of time "even if that year is not one of the 2 consecutive years." 20 C.F.R Section 216.17(b). "Regular non-railroad employment" is defined as "full or part-time employment for pay, " but it does not include "[t]emporary work provided as relief by an agency of a Federal, State, or local government." 20 C.F.R. Section 216.16.

Copies of McCole's W-2 forms show the following earnings for the relevant interval of time:

1989 $1,035 Bay de Noc Community College
1990 $4,447 Bay de Noc Community College
1991 $8,200 Bay de Noc Community College
1992 $8,139 Bay de Noc Community College
1993 $3,573 ($2,630 Bay de Noc; $433 Pro Kleen; $510 R.L. Polk)

McCole asserts that his work at Bay de Noc Community College (College) from August 1989 through August 1991 was through a government work/study program that qualified as "[t]emporary work provided as relief by the Federal, State or local government." The hearings officer did not, however, address this argument.

> The hearings officer finds that it is not necessary to make a determination on whether Mr. McCole's work/study earnings would break a current connection. Even if the hearings officer were to find that the appellant's work/study earnings did not break his current connection, Mr. McCole had part time employment other than work/study in 1991, 1992, and 1993 that broke his current connection.

We agree that it was proper for the hearings officer to avoid deciding this issue because McCole's employment record during 1991, 1992 and 1993 provides substantial evidence for the lack of a current connection.

McCole asserts that his part-time employment with the College other than through the work/study program also qualified as "[t]emporary work provided as relief by the Federal, State or local government" because (1) the College might be funded by a governmental entity or be the instrumentality of a governmental entity and (2) he "was employed to pay for living expenses while attending college, was only receiving minimal income and was living under poverty level". There is no evidence in the record, however, regarding the College's connection to any governmental

entity. McCole argues that he hearings officer and the Board should have asked for this evidence and that their failure to do so denied McCole "a full and fair hearing," particularly because he was unrepresented by counsel. However, McCole was asked whether he wished to be represented by counsel, and he declined.

Further, even if there were evidence that the College was an instrumentality of a state or local government, the language of the regulation does not plainly establish that such part-time, low-paying employment with a governmental entity qualifies as "[t]emporary work provided as relief." The hearings officer explained, "the Board's regulations allow few exclusions from the definition of regular employment....Part time employment by a student is not excluded". The Board agreed with the hearing officer that McCole's part time work for the College broke the current connection [JA 7]. See Stinson v. United States, 508 U.S. 36, 45 (1993) ("[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'").

McCole's second argument on appeal is that the Board's determination that he lacks twenty quarters of coverage during the forty-quarter period ending with the quarter in which he became insured for disability insurance benefits is not supported by substantial evidence and is based on an error of law. McCole asserts that his work for the College should be counted toward the required twenty quarters. He explains that if the College is an instrumentality or integral part of a State or State subdivision, his work there may be counted if the College had an agreement under section 218 of the Social Security Act. See 20 C.F.R. Section 404.1018b. There is, however, no record evidence regarding the College's relationship with any government agency or entity.

The Board relied on the certification it received from the Secretary of Health and Human Services (Secretary),

which shows no social-security covered employment during the period McCole worked at the College. 45 U.S.C. Section 231f(b)(7) provides,

> Such certified reports shall be conclusive in an adjudication as to the matters covered therein: Provided, however, that if the Board or the Secretary of Health and Human Services receives evidence inconsistent with a certified report...such recertification of such report shall be made as, in the judgment of the Board or the Secretary of Health and Human Services, whichever made the original certification, the evidence warrants.

(Emphasis added). The Board argues that under this statute it did not have the ability to entertain a challenge to the Secretary's certification. The plain language of the statute supports that interpretation. We have also explained that "the Board's interpretation [of the Act] should be upheld if it is not fundamentally inconsistent with the language and purpose of the statute." Coker, 806 F.2d at 693.

McCole argues that under Kephart v. Richardson, 505 F.3d 1085 (3d Cir. 1974), the Board was not entitled to rely on the certification and was required to make further inquiry. However, that case does not apply to McCole because (1) the claimant in Kephart had placed contradictory, positive evidence in the record, id. At 1087, whereas here McCole only speculates; (2) the claimant in Kephart sued the Secretary to change the Secretary's certification, id., whereas McCole seeks to have the Board disregard the Secretary's certification; and (3) Kephart involved a statute providing that the absence of an entry was presumptive, but not conclusive, evidence of the absence of qualified employment, id. at 1089, whereas the statute in this case, 45 U.S.C. Section 231f(b)(7), draws no such distinction. McCole's arguments that

the certification is wrong because he may qualify as a government employee or the College may be an instrumentality or integral part of a government with an agreement under section 218 of the Social Security Act must be addressed to the Secretary, not the Board. See Taylor v. Finch, 418 F.2d 1232, 1234 (8th Cir. 1969)

We hold that the Board's position as to both issues raised in McCole's appeal is supported by substantial evidence and is not tainted by an error in law.

PETITION DENIED.

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*The Hon. J. Clifford Wallace, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

No. 00-3751

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
AUG 23 2000
LEONARD GREEN, Clerk

GERALD MCCOLE,
Petitioner,

v. ORDER

RAILROAD RETIREMENT BOARD,
Respondent.

Before: MARTIN, Chief Judge

The petitioner seeks review of a decision of the Railroad Retirement Board with respect to his request for a disability annuity and early Medicare. He has now filed a motion and a supplemental motion to enlarge the administrative record to include material that was not presented before the agency. The Board opposes enlarging the record.

This court has jurisdiction to review final decisions of the Board under the provisions set forth in 45 U.S.C. Section 355(f). 45 U.S.C. Section 231g; *see Gutierrez v Railroad Retirement Bd.*, 918 F.2d 5687, 570 (6th Cir. 1990) The court must determine whether the Board's decision is supported by substantial evidence. "If the record supports the Board's decision, we must accept it without making an independent evaluation of the evidence." *Crenshaw v. U.S.R.R. Retirement Bd.*, 815 F.2d 1066, 1067 (6th Cir. 1987). The statute provides that "[n]o additional evidence shall be received by the court, but the court may order additional evidence to be taken before the

Board...."45 U.S.C. Section 355(f). The petitioner's motions to enlarge the record before this court, therefore, must be denied. The petitioner's request that the court remand the case to the Board to take additional evidence should be addressed by the parties in their appellate briefs and decided by the panel assigned to consider the appeal on the merits.

The motions to enlarge the record are DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

RAILROAD RETIREMENT BOARD

Appeal of
Gerald A. McCole
R.R.B. No. A-368-38-8393

Claims Appeal Docket
No. 98-AP-0097

The Board has reviewed the record in the appeal of Mr. Gerald A. McCole from the decision of the hearings officer and has considered the argument and evidence contained therein. Mr. McCole appeals the March 31, 1998 decision of the hearings officer which found him 1) not to have a current connection with the railroad industry and therefore, not entitled to an occupational disability annuity under section 2(a)(1)(iv) of the Railroad Retirement Act, 2) disabled for all regular employment and therefore, entitled to a disability annuity under section 2(a)(1)(v) of the Railroad Retirement Act effective October 1, 1994, and 3) not entitled to a period of disability and Medicare coverage under the Social Security Act.

The hearings officer has adequately addressed all issues raised by Mr. McCole on appeal. As the hearings officer correctly found, Mr. McCole's part-time work as a custodian for the college he was attending constituted regular employment which would break a current connection. (Exhibit 6). The hearings officer further found that Mr. McCole was disabled for all regular employment due to angina from September 1993. This results in an annuity beginning date for Mr. McCole of October 12, 1994, 12 months before the date of his application for an annuity and the earliest date permitted under section 5(a)(ii) of the Railroad Retirement Act. Finally, although Mr. McCole's employment after he left railroad service broke his current connection, it was not social security covered employment. Consequently, Mr. McCole does not have sufficient quarters of coverage to be eligible for early Medicare.

The Board affirms and adopts the decision of the hearings officer.

The appeal is denied

/s/Cherryl T. Thomas
Cherryl T. Thomas

/s/V.M. Speakman, Jr.
V.M. Speakman, Jr.

/s/Jerome F. Kever
Jerome F. Kever

DECISION OF THE HEARINGS OFFICER

Mr. Gerald McCole Decision No. 98-680
319 West "E" Street Appeal No. 97-0625
Iron Mountain,R.R.B. No. A-368-38-8393
Michigan 49801
MAR 31 1998

ISSUES

There are three issues in the appellant's case: 1) whether he has a current connection with the railroad industry. If he has a current connection, he may be considered for an occupational disability annuity under the provisions of section 2(a)(1)(iv) of the Railroad Retirement Act. 2) If he does not have a current connection with the railroad industry and therefore is not eligible to be considered for an occupational disability annuity, the issue is whether the appellant is disabled for all regular employment and entitled to a disability annuity under the provisions of section 2(a)(1)(v) of the railroad Retirement Act. This section of the Act provides disability annuities to railroad employees who have at least ten years of railroad service and who are disabled for all regular employment. 3) The last issue is whether the appellant is entitled to a period of disability and disability Medicare coverage under the provisions of the Social Security Act.

FINDINGS

1). The hearings officer finds that the appellant does not have a current connection with the railroad industry.

Mr. McCole last worked in the railroad industry in May 1986. He subsequently worked in a work/study program in 1989, 1990, and 1991 while he was attending college. The appellant maintains that the

work he performed through the work/study program is not regular employment within the meaning of the Railroad Retirement Act and regulations, that it is a form of relief provided by the federal and state government. The Railroad Retirement Board regulations provide that regular non-railroad employment is "full or part-time employment for pay" (20 C.F.R. 216.16) excluding "temporary work provided as relief by an agency of a Federal, State, or local government."

The hearings officer finds that it is not necessary to make a determination on whether Mr. McCole's work/study earnings would break a current connection. Even if the hearings officer were to find that the appellant's work/study earnings did not break his current connection, Mr. McCole had part time employment other than work/study in 1991, 1992, and 1993 that broke his current connection. Although Mr. McCole indicated at the hearing and in his statement marked current connection submitted at the hearing that all his work for the college was work/study, his previous statements indicate that the work/study program ended sometime in 1991 and that his work in 1992 and 1993 was part time employment. His letter of December 1, 1996 (Exhibit 6) specifically states that his work/study ended in August 1991. Beginning September 1991 through April 1993, his statement shows that he "worked as a part time custodian at BaydeNoc Community College YMCA-employed by the college while attending college full time." This is inconsistent with a previous letter from Mr. McCole received in December 1995 that his work/study ended in 1991. (exhibit A). The hearing officer finds that the preponderance of the evidence shows that Mr. McCole's work/study program ended in 1991 and that his subsequent earnings for the BaydeNoc Community College was part-time employment that broke his current connection. These earnings were not reported to the Social Security Administration

because they were earnings from a state or local government not covered by the Social Security Act. No FICA taxes for Medicare coverage were deducted apparently due to the exclusion applicable to colleges who employ students.

While the hearings officer understands Mr. McCole believes none of his part-time employment which helped to support him while he attended school should be considered, the Board's regulations allow few exclusions from the definition of regular employment that will break a current connection. Part time employment by a student is not excluded. Mr. McCole does not have a current connection with the railroad industry. As a result, Mr. McCole is not eligible for consideration for an occupational disability annuity under the Railroad Retirement Act.

2). The hearings officer finds that the appellant's impairments, considered in combination, are disabling for all regular employment. The appellant claimed a disability onset date of September 1, 1993 when he filed his disability application with the Railroad Retirement Board. The hearings officer finds that the appellant has been disabled for all regular employment from this date. The medical evidence establishes that he has a combination of impairments as of September 1993-coronary artery disease with angina, chronic obstructive pulmonary disease, diabetes mellitus that are disabling for all regular employment. Although Mr. McCole acquired a college degree in accounting that would provide him with entry into semi-skilled jobs at an entry level, the hearings officer finds that his medical condition is so severe that even with the vocational advantage of his college education he would not be able to perform regular work on a consistent basis.

Mr. McCole is entitled to a disability annuity from October 1, 1994. This date is the first day of the

twelfth month before the month in which he filed his application for a disability annuity. This is the earliest date permitted by law.

3). The appellant is not entitled to a period of disability under the provisions of the Social Security Act.

The appellant's application for a disability annuity is also an application for a period of disability and disability Medicare coverage under the provisions of the Social Security Act. For entitlement to a period of disability/disability Medicare coverage there are two criteria which must be both met: 1) the disability criteria; and 2) and earnings requirement. The appellant meets the disability criteria for a period of disability under the Social Security Act. He does not meet, however, the earnings requirement. To meet the earnings requirement the e claimant must have 20 quarters of covered earnings (earnings creditable under either the Railroad Retirement Act or the Social Security Act) in a 40 quarter period ending with the quarter in which disability began. The appellant has 14 quarters of covered earnings in the 40 quarter period preceding the third quarter of 1993, the quarter in which his disability began. The last time the appellant met the earnings requirement was December 1991. He is not entitled to a period of disability or disability Medicare coverage.

DECISION

It is the decision of the hearings officer that: Mr. McCole does not have a current connection with the railroad industry; he is entitled to a disability annuity under section 2(a)(1)(v) of the Railroad Retirement Act from October 1, 1994; and he is not entitled to a period of disability and disability Medicare coverage.

/s/Grace Tock

Grace Tock
Hearings Officer